God in the Deductions: Tax Deductions for Religion and the Future of Taxpayer Standing for Establishment Clause Challenges

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Introduction

The First Amendment's Establishment Clause[1] has proven to be ripe for debate over the proper role of religion in government.[2] Over the last few decades, the courts have addressed this issue seemingly countless times, while failing to provide a single truly determinative test to assess when government action violates the Establishment Clause.[3] The Supreme Court has proposed so many different tests to weigh Establishment Clause challenges that this entire area of law has become muddled and unclear.[4] Between the *Lemon* test, the endorsement test, the coercion test, and the history-reliant approach of ceremonial deism, no one can ever be certain which standard a court will apply in any particular Establishment Clause case.[5]

One particularly contentious ground in Establishment Clause jurisprudence is the difference between government subsidies granted

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1. The Establishment Clause states that, "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I, cl. 1.

2. Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 726–28 (2006).

3. *Id.* at 729.

4. *Id.*

5. *See, generally*, Lemon v. Kurtzman, 403 U.S. 602 (1971) (for the *Lemon* test); Lynch v. Donnelly, 465 U.S. 668 (1984) (for the endorsement test); Lee v. Weisman, 505 U.S. 577 (1992) (for the coercion test); Van Order v. Perry, 545 U.S. 677 (2005) (for ceremonial deism). For a more explicit explanation of what ceremonial deism entails *see* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM L. REV. 2083 (1996).

directly to religious groups and tax deductions[6] granted to those same institutions.[7] Should the courts treat tax deductions any differently than they treat direct expenditures? In some cases the Supreme Court has refused to make a distinction between the two, yet in others, the Court has found the difference between deductions and expenditures decisive.[8] But, why should the government be allowed to give indirect aid to religion when direct aid would violate the Establishment Clause?

Tax expenditure analysis asks this very question and proposes that the Supreme Court not treat tax deductions any differently than direct expenditures. The basic premise of tax expenditure theory is that there is no economic difference between the government's direct subsidy of an activity or institution and an equivalent tax break for the same activity.[9] Because these actions are economically equivalent, the courts must legally treat them the same.[10] Thus, if a subsidy were unconstitutional, an equivalent tax deduction would also be unconstitutional.

However, the Establishment Clause adds another layer to tax expenditure analysis that the Supreme Court has not yet addressed. Traditionally, standing prevents taxpayers from pursuing a claim in federal court against the state when alleging that a particular state action is unconstitutional without first showing an individual and personalized injury.[11] Unique to the Establishment Clause jurisprudence is a narrow exception that allows taxpayers to establish standing without showing the personal injury required by the Court's modern Standing Doctrine.[12] These taxpayer-plaintiffs have only to allege that the challenged state action violates the Establishment Clause and arises from Congress' exercise of its taxing and spending powers.[13]

6. When this note refers to tax deductions, it refers to tax deductions, tax exemptions, and tax credits altogether.

7. Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 877–78 (1993).

8. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (holding that there was no difference between a direct expenditure and a sales tax exemption for religious periodicals); Mueller v. Allen, 463 U.S. 388 (1983) (holding that tax deductions granted to parents who sent their children to religious schools did not violate the Establishment Clause because the entanglement between the state and religion was much less than what a direct expenditure would require).

9. Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407, 410 (1999).

10. *Id.*

11. Lujan, Jr. v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

12. Flast v. Cohen, 392 U.S. 83, 102–03 (1968).

13. *Id.*

While the Supreme Court has revisited this exception for taxpayer standing several times since its creation, it has yet to address whether it applies to challenges against tax deductions. All the cases reaching the Court on this issue have involved direct expenditures.[14] In cases that involve tax credits, exemptions, or deductions, the Court has either found standing or neglected to raise the issue altogether.[15]

This Note addresses the question of whether the tax expenditure analysis is appropriate for analyzing taxpayer standing in Establishment Clause challenges. Thus far, the Supreme Court has wavered between outright acceptance and rejection of the tax expenditure analysis. This Note proposes that, at least for the issue of taxpayer standing, tax deduction and direct expenditures should not be treated differently. If the Court continues to engage in its usual tax deduction analysis, it will determine the merits of a case when ruling on whether standing is satisfied, which is something that standing ought to avoid.

Part I focuses on the current state of the Supreme Court's taxpayer Standing Doctrine within the context of Establishment Clause cases. This section starts by outlining the modern standing requirements before examining the bar against taxpayer standing and the subsequent exception for Establishment Clause challenges. The analysis highlights how the Court has lacked the enthusiasm to extend taxpayer standing beyond a very narrow exception.

Part II examines tax expenditure analysis and how it applies in Establishment Clause cases. Specifically, this section surveys the cases where the difference between tax deductions and tax expenditures was decisive in the holding. It will identify the factors that influence how the Court decides this question and suggests a potential solution for how the Court can examine this issue by focusing on the intent behind the tax deduction. Analysis of this solution brings to light the potential problems

14. *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587 (2007) (denying taxpayer standing for Establishment Clause challenges to the spending of Executive Branch discretionary funds); Bowen v. Kendrick, 487 U.S. 589 (1988) (allowing taxpayer standing for an Establishment Clause challenge to Executive Branch spending on money appropriated by Congress); Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) (denying taxpayer standing for an Establishment Clause challenge to Congress exercising power under the Property Clause).

15. *See*, *e.g.*, Hibbs v. Winn, 542 U.S. 88 (2004) (challenging state tax credits for payments to non-profit school tuition organizations); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (allowing non-religious periodicals necessary standing to challenge tax exemption for religious periodicals); Mueller v. Allen, 463 U.S. 388 (1983) (challenging Minnesota tax deductions for expense incurred in providing tuition, textbooks, and transportation to private schools); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (challenge to New York tax credits and deductions for attending non-public school).

with such an intent-based approach of assessing the taxpayer standing exception, before ultimately advocating that the Supreme Court adopt a bright-line rule equating tax deductions and direct expenditures. Standing's own internal logic requires that the Court adopt a consistent approach to looking at tax deductions in the taxpayer standing analysis.

I. Taxpayers and Taxpayer Standing

The Supreme Court's Standing Doctrine translates the requirements of Article III's Cases and Controversies Clause[16] into three simple elements.[17] A plaintiff bringing suit in federal court must demonstrate: 1) that he or she has experienced some concrete personal and individualized injury; 2) that the injury is fairly traceable to the defendant's actions; and 3) that a favorable decision from the court will likely redress the plaintiff's injury.[18] Once all of these elements are met, a court can proceed to evaluate the plaintiff's claim on its merits.[19] However, if any one of these elements is not shown, a court cannot constitutionally consider the plaintiff's claim.[20] Through standing, courts seek to answer only those questions that are appropriately justiciable, while leaving to the other branches of government those issues that lack a remediable injury.[21]

A. The (Almost) Absolute Bar Against Taxpayer Standing

Concern over confining courts to appropriately justiciable questions is of particular importance when dealing with the issue of taxpayer standing. Emerging from one of the first standing cases, the Supreme Court placed a barrier on taxpayer standing to limit the extent that courts can review actions of the executive and legislative branches.[22] In *Frothingham v. Mellon*, the Supreme Court articulated the beginning of what would

16. The full clause reads, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1.

17. Lujan, Jr. v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

18. *Id.* at 560–61.

19. *Id.* at 561.

20. *Id.*

21. Flast v. Cohen, 392 U.S. 83, 95 (1968).

22. Frothingham v. Mellon, 262 U.S. 447, 486–88 (1923).

eventually become a central element of the Standing Doctrine.[23] The Court first required that plaintiffs asserting a claim in federal court demonstrate a personal and individualized injury before receiving a judgment on the merits of their controversy.[24]

Frothingham began as a challenge alleging that the federal Maternity Act was unconstitutional.[25] Passed by Congress, this act allocated funds to states with the goal of reducing maternal and infant mortality rates while generally protecting the health of mothers and their infants.[26] The plaintiff, Frothingham, asserted that these expenditures exceed Congress' authority because they usurp the power reserved to states under the Tenth Amendment.[27] She claimed that Congress' unconstitutional action injured her by increasing her tax burden.[28]

Without reaching the merits of Frothingham's claim, the Supreme Court held that she had no standing.[29] According to the Court, a taxpayer's interest in how the monies of the treasury are spent is so small, uncertain, and indeterminable that it could not afford a basis for a court's jurisdiction.[30] Because this interest was shared with millions of other people, Frothingham could only show that she suffered in some indefinite way that was common to taxpayers generally.[31] Thus, federal taxpayers do not suffer an injury capable of raising a judicable question that could satisfy the Cases and Controversy Clause.[32] This prohibition remains a stable and essential part of the Court's Standing Doctrine.[33]

B. The Exception to Taxpayer Standing

For over forty years, the Supreme Court's holding in *Frothingham* remained its final word on the issue of taxpayer standing.[34] Then in 1968, the Supreme Court departed from this hard-line barrier against taxpayer

23. *Id.* at 488.

24. *Id.*

25. *Id.* at 479.

26. *Id.*

27. *Id.*

28. *Id.* at 486–88.

29. *Id.*

30. *Id.* at 487.

31. *Id.* at 488.

32. *Id.*

33. *See generally* Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L. J. 771 (2003).

34. Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429 (1952) (affirming *Frothingham*'s decision to deny standing to taxpayers alleging that state mandated Bible readings in school violated the Establishment Clause).

standing and crafted an exception from which it has since backed away.[35] In *Flast v. Cohen*, the Supreme Court created a limited window allowing taxpayer Establishment Clause challenges to state actions.[36]

Flast involved a federal taxpayer's challenge to the Federal Education Act of 1965.[37] This act gave discretion to the Department of Health, Education, and Welfare to allocate federal funds to local education agencies to aid the education of low-income families.[38] The plaintiff, Flast, alleged that the Department was allocating funds to sectarian schools and that violated the Establishment Clause.[39] In pursuing this challenge, Flast established standing solely via his status as a federal taxpayer.[40]

When the case reached the Supreme Court, the Court reexamined *Frothingham*'s bar against taxpayer standing.[41] Looking at the specific allegation implicating the Establishment Clause, the Court determined that federal taxpayers do have a sufficient interest in ensuring that Congress does not use federal funds to establish a religion to satisfy Article III standing.[42] In order to determine whether a plaintiff had the "personal stake" to invoke a court's authority absent a personal and individualized injury, the Supreme Court promulgated a two-prong test.[43] First, the taxpayer must challenge a congressional act authorized under Article I, Section 8 of the U.S. Constitution,[44] which defines Congress' taxing and spending powers.[45] Second, the taxpayer must allege that Congress violated some constitutional limit placed on its taxing and spending powers.[46] Once both of these requirements were met, plaintiffs would have demonstrated a sufficient personal interest to satisfy standing.[47]

According to the Supreme Court, Flast satisfied both of these prongs.[48] Congress had passed the Federal Education Act of 1965 pursuant to its taxing and spending powers, thereby meeting the first prong of the Court's

35. *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 602–08 (2007).

36. Flast v. Cohen, 392 U.S. 83, 102–03 (1968).

37. *Id.* at 85.

38. *Id.* at 86.

39. *Id.*

40. *Id.* at 85.

41. *Id.* at 95.

42. *Id.* at 105–06.

43. *Id.* at 102–03.

44. U.S. CONST. art. I, § 8 (giving Congress the power to tax and spend for the general welfare).

45. *Flast*, 392 U.S. at 102.

46. *Id.* at 102–03.

47. *Id.* at 103.

48. *Id.* at 102–03.

new test.[49] Next, the Court determined that the Establishment Clause demonstrates a clear intent to prohibit legislators from using the People's money to establish religion.[50] Because the plaintiff had alleged that state action violated the Establishment Clause's limits on congressional authority, he satisfied the test's second prong.[51] Thus, for the first time since *Frothingham*, the Court allowed a case to go forward without requiring that the plaintiff demonstrate a personal and individualized injury.

C. The Boundaries of *Flast*'s Taxpayer Standing Exception

At the time of *Flast*, the Supreme Court was only willing to go so far as to declare that the Establishment Clause satisfied the second prong of its taxpayer standing test. It left to future cases the question of what specific constitutional limitations would trigger *Flast* taxpayer standing.[52] Potentially, this open-ended question could allow for future exceptions far beyond the Establishment Clause's reach. However, the Court quickly pulled back from this when it saddled *Flast* with a rigid formal application, rife with arbitrary distinctions.

The Supreme Court closed off any avenue for broad taxpayer standing when it declined to extend *Flast*'s application beyond the Establishment Clause's limits. The Court held that congressional actions potentially violating the Accounting Clause[53] and the Incompatibility Clause[54] were immune to challenges mounted on *Flast* taxpayer standing.[55] Continuing with this strict interpretation, the Court also limited which types of congressional actions satisfied *Flast*'s first prong.[56] In *Valley Forge Christian College v. Americans United for Separation of Church and State*,

49. *Id.* at 103.

50. *Id.* at 103–04.

51. *Id.* at 104.

52. *Id.*

53. This clause tasks Congress with the obligation to provide, "a regular Statement and Account of the Receipts and Expenditures of all public Money [that] shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7.

54. This clause reads, "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time." U.S. CONST. art. I, § 6, cl. 2.

55. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (denying *Flast* taxpayer standing to plaintiffs seeking to enforce the Incompatibility Clause); United States v. Richardson, 418 U.S. 166, 175 (1972) (denying taxpayer standing to plaintiffs alleging that Congress failed to comply with the Accounting Clause).

56. Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 480 (1982).

the Court declined to extend *Flast* to congressional actions authorized under the Property Clause,[57] while suggesting that the same action performed under Congress' taxing and spending powers would have been susceptible to a taxpayer standing challenge.[58] Together these decisions demonstrate that the Court applies *Flast* with strict rigor and formalism.[59] Only those cases that closely follow the facts from *Flast* would satisfy the exception.[60]

The Supreme Court's most recent decision on *Flast* standing followed this formalist approach to its extreme by introducing an almost imperceptible and arbitrary distinction into the analysis.[61] The Court had previously held in *Bowen v. Kendrick* that executive discretionary spending of funds appropriated by Congress was within the reach of a *Flast* taxpayer standing challenge.[62] However, in *Hein v. Freedom from Religion Foundation, Inc.*, the Supreme Court held that executive discretionary spending using funds appropriated generally from Congress, that is, funds that were not appropriated for any specific purpose, was outside the reach of Establishment Clause challenges mounted on the *Flast* exception.[63] A plurality of the Court distinguished *Hein* from *Bowen* by emphasizing that the executive expenditure at issue in *Bowen* centered on a particular program created by Congress for the executive to administer.[64] Thus, taxpayers can challenge executive discretionary spending when it stems from the administration of a specific program, but they cannot challenge executive discretionary spending from the Executive's discretionary budget, even though Congress appropriates that budget.

A six-member majority of the Court found this distinction to be completely arbitrary and irrational.[65] Justice Scalia, writing in a concurrence for himself and Justice Thomas, advocated overturning *Flast* outright, but noted that the plurality's distinction is wholly irreconcilable

57. U.S. CONST. art. IV,§ 3, cl. 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

58. *Valley Forge Christian Coll.*, 454 U.S. at 480 n.17.

59. For a more detailed criticism of *Valley Forge*'s formalist approach *see* Gene R. Nichol, Jr., *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C. L. REV. 798 (1983).

60. *See* Bowen v. Kendrick, 487 U.S. 589 (1988).

61. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587 (2007).

62. *Bowen*, 487 U.S. at 619.

63. *Hein*, 551 U.S. at 608–09 (plurality opinion).

64. *Id.*

65. *Id.* at 618 (Scalia, J., concurring); *Id.* at 637 (Souter, J., dissenting).

with simple logic.[66] According to Justice Scalia, by focusing on the amount of discretion the executive branch is allowed, the plurality opinion completely broke from *Bowen*'s established precedent to create a meaningless and disingenuous distinction.[67] Justice Souter's dissent shares this sentiment.[68] He argues that *Bowen* controls the outcome and that by allowing this distinction the executive can violate the Establishment Clause without consequence when Congress' similar actions would violate that clause's prohibition.[69]

Rigid formalism and arbitrary distinctions govern the current *Flast* jurisprudence. From *Flast* to *Hein,* the cases reveal that the Court disfavors giving taxpayers the ability to circumvent the traditionally firm personal injury requirement of Article III's standing. This relationship hangs like a dark cloud over any question of whether the Court would be willing to extend *Flast* further than its jurisprudence currently allows.

II. Congressional Expenditures and Tax Deductions: Is There a Difference?

Cases like *Hein* demonstrate that in its taxpayer standing jurisprudence, the Supreme Court has often consciously refused to follow the *Flast* holding to the extent of its logic. Thus, when asking whether the Court would apply *Flast* equally to tax deductions, it is unclear what approach the Court will favor. The Court's Establishment Clause cases dealing with the difference between tax deductions and direct expenditures are important in understanding how the Court will treat this issue in the similar context of *Flast* taxpayer standing.

A. Tax Expenditure Theory Explained

The central concept of tax expenditure analysis prompts courts to treat direct expenditure, subsidy, tax deduction, and tax exemption programs all the same.[70] If a taxpayer receives a tax deduction, then tax expenditure theory would require that the courts treat that deduction exactly as if the Congress had granted the same amount of money directly to the taxpayer.[71] This analysis acknowledges that subsidies and deductions carry similar

66. *Id.* at 618 (Scalia, J., concurring).

67. *Id.* at 632–33.

68. *Id.* at 637 (Souter, J., dissenting).

69. *Id.* at 640.

70. Adler, *supra* note 7, at 860–61.

71. David A. Brennen, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 BYU L. REV. 167, 209 (2001).

economic effects.[72] When the government chooses to forgo taxing, it removes certain resources from its grasp that it would otherwise be entitled to collect. The taxpayer effectively becomes richer as a result of the government's decision to forgo collecting those resources.

Tax expenditure theory recognizes that the tax code serves more functions than simply defining income and raising revenue.[73] Congress can and does encourage certain behavior through provisions of the tax code.[74] For example, Congress encourages donations to charities by granting taxpayers a deduction for their charitable contributions.[75] The theory behind this deduction is that taxpayers will take advantage of it to reduce their tax liability, thus aiding a charitable organization that would not have received that aid if the tax deduction did not incentivize the taxpayer to act. Congress has wide latitude to structure its social and economic policies according to how it wants to encourage or discourage certain behavior.[76]

The theory suggests that the tax code is comprised of two distinct types of provisions.[77] Certain provisions define income for the sole purpose of raising revenue.[78] These provisions are known as "structural provisions" and would not be treated as if they were direct expenditures.[79] Such provisions are not substitutes for subsidies because they are not designed to encourage any particular behavior.[80] Other provisions carry out Congress' policy goals, and those "tax expenditure" provisions lie at heart of the tax expenditure analysis.[81]

Scholars propose that tax expenditure analysis requires that courts treat tax deductions as if they were direct expenditures.[82] Tax expenditure provisions serve a social policy goal beyond simply defining income. Through these provisions, Congress exercises its broad powers to encourage a certain activity, which it could accomplish just as easily through its power to grant subsidies.[83] When Congress grants a tax deduction in place of a subsidy, tax expenditure theory posits that the same

72. Adler, *supra* note 7, at 861.
73. *Id.* at 859.
74. *Id.*
75. I.R.C. § 170 (2010).
76. Adler, *supra* note 7, at 860.
77. *Id.*
78. *Id.*
79. *Id.*
80. Sugin, *supra* note 9, at 419.
81. *Id.*
82. Adler, *supra* note 7, at 861.
83. *Id.*

rules and limits on Congress' power should apply.[84] If Congress could not act without violating the Constitution when subsidizing an activity, then it should not be able to do the same thing through a tax deduction.[85] Thus, tax expenditure analysis seeks consistency in how the law is applied.

B. Tax Deductions in Establishment Clause Cases

The Supreme Court has adopted a variety of approaches when analyzing whether to treat a particular tax deduction as if it were a direct expenditure. Of particular interest to the question of whether tax expenditure analysis should extend to *Flast* is how the Supreme Court treats tax deductions within the Establishment Clause arena. Because *Flast* is so integrally tied to the Establishment Clause, these cases ought to give insight into whether the Court would be receptive to applying *Flast* taxpayer standing to challenges of tax deductions. Unfortunately, these cases reveal that the Court has failed to adopt a clear rule on this question.

1. Walz v. Tax Commission of the City of New York

In the context of the Establishment Clause, *Walz v. Tax Commission of the City of New York*[86] was the first case to closely examine whether tax deductions were equivalent to direct expenditures.[87] *Walz* was an Establishment Clause challenge to the New York tax code, which sought to prevent the New York City Tax Commission from granting property tax exemptions to religious organizations that owned property and used that property for exclusively religious purposes.[88] The *Walz* plaintiffs argued that the tax exemption indirectly required them to "make a contribution to religious bodies."[89] In essence, the plaintiffs argued that the tax exemption amounted to the state directly subsidizing religion with collected tax monies.

The Supreme Court rejected this contention and upheld the New York tax exemption.[90] The Court found that a subsidy was different from the tax exemption that was at issue in *Walz*.[91] While acknowledging that religion did receive some financial benefit, it explained that the tax exemption was

84. *Id.*
85. *Id.*
86. Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970).
87. Brennen, *supra* note 71, at 213.
88. *Walz*, 397 U.S. at 666.
89. *Id.* at 667.
90. *Id.*
91. *Id.* at 675.

not equivalent to a direct subsidy.[92] Tax exemptions were actually less likely to violate the Establishment Clause because no revenue flowed directly from the state to any religious group, which meant the exemption did not require the state to administer or enforce how the money was spent.[93] The Court conceded, however, that a subsidy granting the same benefit to religion would violate the Establishment Clause.[94] After explicitly rejecting that the two things were equivalent, the Court found that the exemption did not advance religion because it was not available to any particular religion and, more importantly, it was available to many non-sectarian organizations as well.[95] Thus, in *Walz*, the form of the benefit, an exemption, significantly influenced the Court's decision.

2. Committee for Public Education and Religious Liberty v. Nyquist

The Supreme Court nearly reversed itself from its position in *Walz* when it came to consider the question again in *Committee for Public Education and Religious Liberty v. Nyquist*.[96] The plaintiffs in *Nyquist* alleged that certain New York statutes providing financial aid programs for private grade schools violated the Establishment Clause.[97] These programs included grants to private schools, tuition reimbursement for low-income parents sending their children to those schools, and tax deductions for parents paying private school tuition.[98] The plaintiffs alleged that these programs violated the Establishment Clause because a substantial majority of the schools benefiting from them were religious.[99]

The programs at issue in *Nyquist* included both direct subsidies and tax deductions, yet the Supreme Court treated them exactly the same.[100] The Court found that a financial benefit granted to a religious organization violated the Establishment Clause regardless of how that benefit was distributed.[101] Whether that benefit was administered through a direct subsidy or a tax deduction did not matter to the Court's analysis because these were targeted benefits available exclusively to religious private

92. *Id.* at 673.
93. *Id.*
94. *Id.* at 675.
95. *Id.*
96. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789 (1973).
97. *Id.* at 762–63.
98. *Id.*
99. *Id.* at 768.
100. *Id.* at 789–91.
101. *Id.*

schools and parents sending their children to those schools.[102] Therefore, the Court held that all provisions violated the Establishment Clause regardless of their form.[103]

3. Mueller v. Allen

In *Mueller v. Allen*,[104] the Supreme Court once again completely changed its position on how to treat direct expenditures and tax deductions.[105] Minnesota allowed taxpayers to claim deductions for tuition and transportation expenses incurred while educating their children.[106] Because the substantial majority of private schools that benefited from these deductions were parochial schools, the *Mueller* plaintiffs filed suit claiming that these deductions violated the Establishment Clause.[107] The Supreme Court rejected this challenge and held that the deductions did not violate the Establishment Clause because they did not have the primary purpose of advancing religion.[108]

Turning to the issue of whether these tax deductions should be treated the same as direct expenditures, the Supreme Court rejected its previous holding from *Nyquist* and ruled that there was a clear difference between the two types of financial assistance.[109] While the Court did acknowledge that tax deductions could violate the Establishment Clause, it found that Minnesota's deductions did not.[110] The deductions were neutrally offered to all taxpayers regardless of whether their children attended a public school or a religious private school.[111] Any financial benefit that the parochial schools received arose from the private choice of the parents and not the state, which the Court found key in its analysis.[112] The Court relied on this difference to hold that the deductions were constitutional.[113]

102. *Id.*
103. *Id.* at 793–94.
104. Mueller v. Allen, 463 U.S. 388 (1983).
105. *Id.* at 398.
106. *Id.* at 391.
107. *Id.* at 392.
108. *Id.*
109. *Id.* at 398.
110. *Id.* at 400.
111. *Id.*
112. *Id.* at 401–02.
113. *Id.*

4. Texas Monthly, Inc. v. Bullock

Again in *Texas Monthly, Inc. v. Bullock*, the Supreme Court flip-flopped on how it treated tax deductions.[114] Texas exempted periodicals published or distributed by religious groups from the state's sales tax.[115] Non-religious publishers and distributors did not receive a comparable exemption.[116] One of the non-religious publishers brought suit, claiming that this special exemption for religious periodicals violated the Establishment Clause.[117]

The Supreme Court agreed and held that the tax exemptions were unconstitutional.[118] When examining the tax exemption, the Court found that every tax exemption constitutes a subsidy, which forces taxpayers into becoming "indirect and vicarious donors."[119] By exclusively granting this tax exemption, Texas was in effect directly subsidizing religious organizations, which burdened non-religious periodicals still subject to the state's sales tax.[120] The Court explained that such a direct subsidy would surely violate the Establishment Clause, and that this tax exemption violated the clause as well.[121] However, the Court added that this tax exemption might not have violated the Establishment Clause if it had been offered to a larger neutrally defined group, much like the widely defined property tax exemption in *Walz*, which both secular and religious organizations could claim.[122]

5. Rosenberger v. Rector and Visitors of the University of Virginia

In *Rosenberger v. Rector and Visitors of the University of Virginia*, the Supreme Court once again dealt with indirect aid to religion and whether that indirect aid should be treated as if it was a direct subsidy.[123] The University of Virginia allowed student organizations to apply for and have the university fund their student publications.[124] A religious student group sought funding from the university to pay for its religious

114. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989) (plurality opinion).

115. *Id.* at 5.

116. *Id.*

117. *Id.* at 6.

118. *Id.* at 14.

119. *Id.* (citing Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983)).

120. *Id.* at 15.

121. *Id.*

122. *Id.* at 16.

123. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 823 (1995).

124. *Id.*

publication, which the school refused to do by claiming that such an act would violate the Establishment Clause.[125]

The Supreme Court disagreed with the university's position, holding that these payments for printing costs did not violate the Establishment Clause.[126] The university's program was facially neutral because it offered to pay the printing costs for any qualified student organization that applied.[127] Because the *Rosenberger* plaintiffs fit into this neutral definition, the university would not impermissibly support religion by paying for the printing of the group's religious publication.[128]

The Court's analysis turned on whether there was direct aid to religion, thus the Court neglected to look at whether the indirect aid given to religion through these payments amounted to an Establishment Clause violation.[129] Rather, the Court found that the university was not taxing its students and then giving that money directly to a religious group.[130] Key to the Court's analysis was that the university did not pay any money directly to the religious organization.[131] The money instead went directly to the printer.[132] This analysis implies a firm rejection of tax expenditure theory. The Court here seems to suggest that taxes can only violate the Establishment Clause when the proceeds of those taxes flow directly in support of religion.[133]

Interestingly, while the Court avoided discussing the difference between direct payments and indirect support through tax deductions, Justice Thomas explicitly acknowledged and accepted tax expenditure theory in his concurrence.[134] Justice Thomas explained that functionally and economically there is little difference between indirect aid, like tax deductions, and direct monetary subsidies.[135] But he then turned the traditional tax expenditure analysis around, and claimed that it justifies direct financial support of religion.[136] Because the Court had previously

125. *Id.* at 826–27.
126. *Id.* at 840.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 859 n.5 (Thomas, J., concurring).
135. *Id.* at 860–61.
136. *Id.*

allowed indirect support of religion in *Walz* and *Mueller*, Justice Thomas argued that direct support was also constitutional.[137]

6. Zelman v. Simmons-Harris

Though *Rosenberger* appeared to have left a hard rule regarding when indirect financial aid to religion would violate the Establishment Clause, the Supreme Court returned to this issue in *Zelman v. Simmons-Harris*.[138] Ohio instituted a school voucher program that allowed parents to receive tuition aid to send their children to schools participating in the program.[139] These schools could be either public or private.[140] Because many of the participating private schools were religious, a group of Ohio taxpayers sued alleging that the program violated the Establishment Clause.[141]

Citing to its decisions in *Walz* and *Mueller*, the Supreme Court upheld Ohio's voucher program because it turned entirely on private choice.[142] The Court explained that in a program of true private choice with neutrally defined religious categories to choose from, the state was relieved of any Establishment Clause problem because the state was not the one choosing to aid religion.[143] The parents receiving the aid made the choice of how to use their vouchers, which alleviated the state's responsibility.[144] Thus, the Court found that the voucher program was constitutional because this indirect aid was clearly different than direct aid.[145]

C. The Establishment Clause, Tax Expenditure Analysis and Taxpayer Standing

Together these cases demonstrate that the Supreme Court has failed to adopt a bright-line rule regarding how it will treat tax deductions. When turning to how the Court will treat tax deductions under the *Flast* taxpayer-standing analysis, these cases fall short of clearly signifying how the Court will act in this similar context. However, these cases do indicate what the Court will consider in determining whether it is appropriate to treat a tax deduction as a direct expenditure. Because the *Flast* taxpayer spending analysis is so rigidly tied into the Establishment Clause, the Court's

137. *Id.*
138. Zelman v. Simmons-Harris, 536 U.S. 639, 661 (2002).
139. *Id.* at 645.
140. *Id.*
141. *Id.*
142. *Id.* at 661.
143. *Id.*
144. *Id.*
145. *Id.*

treatment of tax expenditures within the Establishment Clause context is important in determining whether *Flast* will apply to tax deductions as well.

The Supreme Court has identified a number of factors that it will consider when deciding whether to treat indirect financial support of religion as a direct subsidy from the state. The Court appears to be most concerned with taxpayer choice, the scope of the deduction, and if any non-religious groups receive the same tax benefit. By considering these factors, the Court engages in a fact specific, case-by-case analysis when it decides how to approach a tax deduction. This analysis suggests that even though the Court is aware of tax expenditure theory, it has been wary to adopt or reject it outright.[146]

In cases like *Nyquist* and *Texas Monthly*, the Supreme Court found that there was no difference between direct expenditures and tax deductions. The Court acknowledged in both cases that the tax exemptions were directly targeted to aid religion at the expense of non-religious groups, which were entirely excluded from the exemptions' benefits.[147] The narrow and focused nature of these deductions led the Supreme Court to follow traditional tax expenditure theory in its decision to equate tax deductions with subsidies.[148] These decisions stand in contrast to cases where the Supreme Court has found that there is a difference between the two. In those cases, the tax deductions were broad blanket provisions that were neutrally provided to both non-religious and religious organizations alike.[149]

Additionally, in cases where the Court found that there was a clear difference between indirect financial aid to religion and direct expenditures, there was usually some choice by a third-party private citizen that relieved the government of its responsibility. In *Mueller*, *Rosenberger* and *Zelman*, the Court found that intervening private choice influenced its decision to treat indirect financial aid differently than it would have treated the same provisions if they had provided for direct expenditures.[150] Thus, while a direct expenditure would violate the Establishment Clause, the Court has determined that an indirect tax benefit would not if it was the

146. Justice Thomas' concurrence and the dissent in *Rosenberger* show that the Court is aware of tax expenditure theory. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

147. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789–91 (1973).

148. *Texas Monthly*, 489 U.S. at 14; *Nyquist*, 413 U.S. at 789.

149. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 675 (1970).

150. Zelman v. Simmons-Harris, 536 U.S. 639, 661 (2002); *Rosenberger*, 515 U.S. at 840; Mueller v. Allen, 463 U.S. 388, 401–02 (1983).

result of a taxpayer's private choice. These cases demonstrate that the Court's decision on how to treat a tax deduction largely depends on how the tax deduction is structured and administered.

The Court's analysis seems to be an attempt to determine the intent behind the particular tax deduction that is at issue. Those tax deductions that appear intended to serve as simple substitutes for direct expenditures are treated as if they were direct expenditures. For example, the sales tax exemption in *Texas Monthly* was exclusively granted to religious periodicals, which the Court understood to show intent to give religious periodicals a benefit not available to other periodicals.[151] On the other hand, the Court treats tax deductions that are part of larger schemes not specifically directed towards religion as different from direct subsidies. The Court found that *Mueller* involved a tax scheme aimed at helping parents by reducing the cost of sending their children to school.[152] According to the Court, this aid was incidental to the overall program, which made the deductions available to both public and private schools.[153] The broad neutral application of the statute seems to suggest that the intent behind the statute was not to aid parochial schools specifically, but rather to aid all parents regardless of the schools their children attended. Therefore, it seems that whether the Supreme Court follows tax expenditure analysis largely depends on the evidence surrounding the tax deduction at issue and seems to turn on the intent underlying those deductions.

Professor Sugin suggests that the Court should explicitly adopt this intent based approach when evaluating tax deductions.[154] She argues that discerning government intent is crucial in any Establishment Clause analysis of a statute, and it should also be crucial in how courts treat tax deductions.[155] Under her analysis, the more targeted tax provisions would be vulnerable to tax expenditure analysis because government intent would be easier to infer from the evidence.[156] The more general a provision is, the less vulnerable it would be because its generality would not demonstrate a specific intent to advance religion.[157]

For example, if the tax code were amended so that only charitable contributions to Christian organizations qualified for a tax deduction,[158]

151. *Texas Monthly*, 489 U.S. at 15.

152. *Mueller*, 463 U.S. at 400.

153. *Id.*

154. Sugin, *supra* note 9, at 437.

155. *Id.* at 438.

156. *Id.* at 437.

157. *Id.*

158. Contributions to charitable organizations are tax deductable. I.R.C. § 170 (2010).

then Professor Sugin's intent analysis would find that amended code unconstitutional for violating the Establishment Clause. This type of statute would be susceptible to tax expenditure analysis because its targeted nature reveals intent to aid Christian organizations. Thus, it would be treated as if it were a direct expenditure aiding religion. However, the code currently stands as a broad laundry list of qualifying charitable organizations, which includes religious organizations.[159] Laundry list provisions would not fall under the tax expenditure analysis because they do not suggest intent to aid religion. Instead, those provisions demonstrate that religion is only receiving a benefit incidental to a tax scheme designed to achieve a much larger goal.

While this may be the appropriate solution when determining whether a tax deduction violates the Establishment Clause outright, this solution is unworkable for resolving the taxpayer standing question posed by the *Flast* analysis. Unlike the question of whether some state action violates the Establishment Clause, the standing inquiry is not a fact-specific inquiry. Standing simply asks whether the plaintiff has alleged the proper elements to invoke the court's power to adjudicate his or her claim.[160]

Whereas the normal standing inquiry requires the plaintiff to allege a specific individual and personal injury, *Flast* standing allows taxpayers to proceed with suit alleging that a particular state action violates the Establishment Clause without showing a personal injury.[161] To do this, the taxpayer must connect the challenged state action to a congressional act aiding religion. The problem is that indirect aid to religion is often difficult to identify when it is administered through tax deductions rather than direct expenditures. According to the Court, as long as the challenged state action is tied to Congress' taxing and spending powers, it should be susceptible to taxpayer standing.

However, the cases discussed above demonstrate that equating tax deductions with expenditure is not so easy within the context of the Establishment Clause. This is especially true because the Supreme Court has imposed such arbitrary and rigid requirements on taxpayers trying to assert *Flast* taxpayer standing. The Court has been unwilling to extend *Flast* to even the natural limits of its own logic, which a majority of the Court recognized in *Hein*.[162] The difference between direct congressional

159. For a list of qualified charitable organizations to which a taxpayer may donate and claim an income tax deduction, see I.R.C. § 501(c) (2010).

160. Lujan, Jr. v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

161. Flast v. Cohen, 392 U.S. 83, 102–03 (1968).

162. *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587 (2007).

expenditures and tax deductions may become another of the arbitrary distinctions that are common to *Flast*'s jurisprudence.

For the Supreme Court to avoid further muddling this area of law with inconsistent results, it must adopt a bright-line rule concerning *Flast* and tax deductions. The Court should either allow *Flast* taxpayer standing to challenge tax deductions, or prohibit it. To remain consistent with its other Establishment Clause tax deduction cases, the Court must extend the first prong of *Flast*'s taxpayer standing analysis to cover challenges to tax deductions. To do otherwise would suggest that tax deductions somehow fall outside the reach of the Establishment Clause. By challenging a tax deduction, a taxpayer-plaintiff will have satisfied the first prong of the *Flast* test. As long as the second prong is also met, that taxpayer will have met the exception for taxpayer standing.

The Supreme Court's own Establishment Clause tax deduction cases indicate that tax deductions fall under judicial review as much as any direct expenditure. In each case, the Court went through a detailed fact specific analysis to determine whether the specific tax provision at issue would be treated as a direct expenditure or as something else. But, before even that analysis, each case started from the assumption that the Establishment Clause applied. To achieve consistent results with its *Flast* jurisprudence and tax deduction cases, the Court should adopt tax expenditure theory for this narrow analysis.

Implicit in all of these cases is the idea that the Court considers indirect aid to religion to be within the sphere of the Establishment Clause's limits. In some cases indirect aid through tax deductions was impermissible, while in others the same type of indirect aid was entirely constitutional. However, none of these cases suggested that tax deductions or other indirect aid fall outside of the Establishment Clause's purview entirely. While the difference between the two was important to the outcome of the cases discussed above, both subsidies and deductions invoked the Court's full Establishment Clause analysis. A tax deduction could violate the Establishment Clause just as easily as a direct expenditure if that deduction was narrowly granted and specifically targeted towards aiding religion. Therefore, at the preliminary standing stage, tax deductions should sufficiently invoke the taxpayer's interests in preventing the state from aiding religion.

If the Supreme Court were to continue to equivocate between treating tax deductions as expenditures, then the inquiry into whether a tax deduction satisfied *Flast*'s first prong would become conclusive. Typically, the Court examines the scope of deduction, whether the statute neutrally defines the groups that benefit and whether there is an intervening private choice when examining whether a tax deduction should be treated

as a subsidy. This is a fact-intensive approach that would ultimately determine the outcome of the case. Those tax deductions that the Court found indistinguishable from expenditures would also be found to violate the Establishment Clause.[163] When the Court determined that there was a clear difference between the two, it found the tax deductions constitutional.[164] Yet, the Court cannot follow this analysis when examining standing because in doing so the Court would necessarily decide the outcome of the case as well, which is a result that standing intends to avoid. In cases were a court found taxpayer standing, the challenged deductions would be unconstitutional. Thus, the Court must rule that tax deductions satisfy *Flast* to avoid this problem.

In summary, the logic behind standing obligates the Supreme Court to adopt a bright-line rule treating tax deductions in the *Flast* analysis as if they were direct expenditures. To avoid having an inquiry into taxpayer standing turn into a larger determination of the case's merits, the Court must adopt a rule declaring that all congressional tax deductions satisfy *Flast*'s first prong. Because the Court has already acknowledged in several Establishment Clause cases that tax deductions fall within the limits of that clause's prohibition, it should treat tax deductions as direct expenditures in the *Flast* analysis to avoid inconsistent results.

Conclusion

This Note demonstrates that tax deductions and taxpayer standing remain two areas of the law that the Supreme Court has yet to clarify. The future of *Flast*'s exception to the bar against taxpayer standing looks hazy. Several members of the Court seem committed to overturning *Flast* outright, while others limit *Flast*'s application through strict and arbitrary line drawing. As it stands, certain kinds of congressional appropriations are subject to *Flast*-based Establishment Clause challenges and other congressional appropriations are not. How the Court will assess tax deductions under this scheme remains to be seen.

The Court's cases addressing whether tax deductions are legally equivalent to direct expenditures offer little guidance on this question. Within the similar context of the Establishment Clause, the Court has shifted between two extreme positions. According to the Court, certain tax deductions are indistinguishable from direct subsidies while others are completely different. Often this determination is the result of an intensive

163. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789–91 (1973).

164. Zelman v. Simmons-Harris, 536 U.S. 639, 661 (2002); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 840 (1995); Mueller v. Allen, 463 U.S. 388, 401–02 (1983).

fact-specific inquiry into the structure and intent behind the tax deduction. However, such an inquiry does not readily lend itself to a standing analysis.

The Supreme Court needs to adopt a position equating all tax deductions to tax expenditures for the *Flast* analysis. While the Court has treated tax deductions differently depending on the facts, all of its cases addressing deductions start from the position that deductions fall within the Establishment Clause's limits. In a standing analysis, which looks at the facts alleged by the plaintiff, the Court's consistent position that tax deductions warrant Establishment Clause treatment indicates that it would also treat tax deductions as expenditures for the preliminary question of whether standing has been satisfied. Some of those tax deductions may be indistinguishable from expenditures, but courts need to examine the facts to make that determination. If courts continue to examine these factors before deciding this question, they may have to retroactively find standing when they rule that the tax deduction at issue is no different from a subsidy. For the threshold question of standing, tax deductions should be considered sufficiently tied to Congress' taxing and spending power to satisfy the first *Flast* prong and allow the courts to consider the greater Establishment Clause issues alleged.